No. 87-1467

Supreme Court, U.S.
FILED
AUG 5 1988
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

—*v.*—

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

STANLEY GODOFSKY
Counsel of Record
DONALD F. LUKE
MARY LEE DONAHUE
KENNETH L. MILLER
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 878-8000

PAUL J. MISHKIN
91 Stonewall Road
Berkeley, California 94705

ROBERT HAYDEN BURNS
CONSTANCE O'DOHERTY BARNES
Butler & Binion
1600 Allied Bank Plaza
Houston, Texas 77002

RALPH J. AIELLO
Banque Paribas
787 Seventh Avenue
New York, New York 10019

Attorneys for Respondent

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a federal court sitting in diversity is required to follow a state intermediate appellate court decision which is at variance with principles of law enunciated by the highest court of that state and which has been found to be erroneous by the highest court of that state?

RULE 28.1 STATEMENT

Respondent's parent, affiliates and non-wholly-owned subsidiaries are listed in Appendix 1 to the Brief in Opposition previously filed in this Court. Amendments necessary to make that list currently accurate are included in Appendix 1 attached hereto.

TABLE OF CONTENTS

	PAGE
COUNTERSTATEMENT OF QUESTION PRESENTED	i
RULE 28.1 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
STATUTES AND RULES INVOLVED	1
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. THE ISSUES RELATING TO UNPUBLISHED DECISIONS ARE MOOT	11
II. THE FIFTH CIRCUIT'S DECISION IS CORRECT BASED ON TEXAS LAW AS ENUNCIATED BY THE TEXAS SUPREME COURT	13
III. THE TEXAS SUPREME COURT HAS CONFIRMED THAT THERE IS ERROR IN THE *KERR* OPINION	20
IV. LATE PUBLICATION OF THE *KERR* OPINION DOES NOT INVALIDATE THE FIFTH CIRCUIT'S DECISION	22
V. THERE IS NO BASIS FOR CERTIFICATION TO THE TEXAS SUPREME COURT	23

PAGE

CONCLUSION 25

APPENDICES

Amendments to Rule 28.1 Statement 1A

Rules of Decision Act, 28 U.S.C. § 1652 (1982) 2A

Texas Government Code § 22.001 ..... 2A

Rule 90 of the Texas Rules of Appellate Procedure 3A

Rule 133 of the Texas Rules of Appellate Procedure 5A

Section 5.106 of the Texas Business and Commercial Code 6A

Application for Irrevocable Letter of Credit No. 711828FT dated July 9, 1981 and submitted to Banque de Paris et des Pays-Bas by Houston Oil & Refining, Inc. 7A

Letter issued by Clerk of the Court of Appeals for the Seventh District of Texas at Amarillo on January 27, 1988 in *Kerr Construction Co.* v. *Plains National Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, writ denied) 9A

Motion to Publish filed by Exxon Co., U.S.A. on March 4, 1988 in the Texas Supreme Court in *Plains National Bank* v. *Kerr Construction Co.*, No. C-7185 ..... 10A

Order issued by the Texas Supreme Court on April 27, 1988 in *Plains National Bank* v. *Kerr Construction Co.*, No. C-7185 ..... 13A

Letter issued by Clerk of the Texas Supreme Court on May 25, 1988 in *Plains National Bank* v. *Kerr Construction Co.*, No. C-7185 ..... 14A

PAGE

Letter issued by Clerk of the Texas Supreme Court on June 1, 1988 in *Plains National Bank* v. *Kerr Construction Co.*, No. C-7185 ..... 16A

Motion to Publish filed by Exxon Co., U.S.A. on June 2, 1988 in the Court of Appeals for the Seventh District of Texas at Amarillo in *Kerr Construction Co.* v. *Plains National Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, writ denied)..... 18A

TABLE OF AUTHORITIES

Cases	PAGE
AMF Head Sports Wear, Inc. v. *Ray Scott's All-American Sports Club, Inc.*, 448 F. Supp. 222 (D. Ariz. 1978)	18
BA Commercial Corp. v. *Hynutek, Inc.*, 705 S.W.2d 713 (Tex. App.—Dallas 1986, no writ)	16
Bernhardt v. *Polygraphic Co. of Am.*, 350 U.S. 198 (1956)	14
Berry v. *Berry*, 647 S.W.2d 945 (Tex. 1983)	9, 12, 21, 22
Champlin Oil & Ref. Co. v. *Chastain*, 403 S.W.2d 376 (Tex. 1966)	10, 19
CKB & Assocs., Inc. v. *Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653 (Tex. 1987)	10, 15, 18
Commissioner v. *Estate of Bosch*, 387 U.S. 456 (1967)	14
Continental Oil Co. v. *Doornbos*, 402 S.W.2d 879 (Tex. 1966)	10, 19
Cypress Bank v. *Southwestern Bell Tel. Co.*, 610 S.W.2d 185 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.)	10, 16, 18
De Funis v. *Odegaard*, 416 U.S. 312 (1974)	9, 13
Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938)	10, 12, 13, 14, 24
Exxon Co., U.S.A. v. *Banque de Paris et des Pays-Bas*, 828 F.2d 1121, *reh'g denied*, 835 F.2d 1433 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1572 (1988)	2
Fina Supply, Inc. v. *Abilene Nat'l Bank*, 726 S.W.2d 537 (Tex. 1987)	10, 15, 16, 17, 18, 19
Hanna v. *Plumer*, 380 U.S. 460 (1965)	12

PAGE

Honig v. *Doe*, 108 S. Ct. 592 (1988) 9, 13

Hyland Hills Metro. Park & Recreational Dist. v. *McCoy Enters., Inc.*, 554 P.2d 708 (Colo. Ct. App. 1976) ...10, 18

Insurance Co. of N. Am. v. *Heritage Bank, N.A.*, 595 F.2d 171 (3d Cir. 1979)..... 18

Kerr Constr. Co. v. *Plains Nat'l Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, writ denied) .....*passim*

King v. *Order of United Commercial Travelers of Am.*, 333 U.S. 153 (1948) 12, 14

Liberty Nat'l Bank & Trust Co. v. *Bank of Am. Nat'l Trust & Savs. Ass'n*, 218 F.2d 831 (10th Cir. 1955) ..10, 18

Milam Bldg. Co. v. *Dannelley*, 57 S.W.2d 345 (Tex. Civ. App.—Waco 1933) 11, 19

Osburn v. *Smart*, 58 S.W.2d 1073 (Tex. Civ. App.—Fort Worth 1932, writ dism'd)..... 18

Republic Nat'l Bank v. *Northwest Nat'l Bank*, 578 S.W.2d 109 (Tex. 1978).....10, 15, 17, 18

Siderius, Inc. v. *Wallace Co.*, 583 S.W.2d 852 (Tex. Civ. App.—Tyler 1979, no writ).....10, 16, 18

Temple-Eastex, Inc. v. *Addison Bank*, 672 S.W.2d 793 (Tex. 1984).....10, 15, 16, 18

Thompson v. *Waits*, 159 S.W. 82 (Tex. Civ. App.—Austin 1913) 11, 19

United States v. *Ellicott*, 223 U.S. 524 (1912) 11, 19

West v. *American Tel. & Tel. Co.*, 311 U.S. 223 (1940) 14

Westwind Exploration, Inc. v. *Homestate Savs. Ass'n*, 696 S.W.2d 378 (Tex. 1985).....10, 15 16, 18

Wheeler v. *Aldama-Luebbert*, 707 S.W.2d 213 (Tex. App.—Houston 1986).....9, 12, 21

PAGE

Statutes

28 U.S.C. § 1652 (1982) 1

Tex. Bus. & Com. Code Ann. § 5.106(b) (Vernon 1968) 1, 17

Tex. Bus. & Com. Code Ann. § 5.114(c) (Vernon 1968) 17

Texas Gov't Code § 22.001(a) (Vernon 1986)..... 1, 11, 20, 21

Rules

1st Cir. R. 36.2(b)(6)..... 12

2d Cir. R. 0.23 12

7th Cir. R. 53(b)(2) 12

8th Cir. R. 8(i) 12

9th Cir. R. 36-3 12

10th Cir. R. 36.3 12

D.C. Cir. Rule 11(c) 12

Fed. Cir. R. 18(c)..... 12

Ariz. R. Civ. App. P. 28 12

Ark. Sup. Ct. and Ct. App. R. 21 12

Cal. Ct. R. 976, 977 12

Colo. App. R. 35..... 12

D.C. Ct. App. R. 36, 28(h) 12

Haw. R. App. P. 35 12

Ind. R. App. P. 15 12

PAGE

Kan. Sup. Ct. R. 7.04 12

Ky. R. Civ. P. 76.28 12

La. Ct. App. R. 2-16.2, 2-16.3 12

Md. R. 1092 12

Mich. App. R. 7.215 12

Miss. Sup. Ct. R. 35 12

Nev. Sup. Ct. R. 123 12

N.J. Ct. R. 1:36-2, 1:36-3 12

N.M. R. App. P. 12-405 12

Okla. R. Civ. App. P. 1.200 12

Tex. R. App. P. 90 ..... *passim*

Tex. R. App. P. 133 ..... 1, 11, 21

Wis. R. App. P. 809.23 12

Other Authorities

Carlson & Garcia, *The New Discretionary Review Powers of the Texas Supreme Court*, 1987 Tex. B.J. 1201 (Dec. 1987) 20, 21

Nichols, *Selective Publication of Opinions: One Judge's View*, 35 Am. U.L. Rev. 909 (1982) 12

Note, *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L. Rev. 128 (1977) 12

R. Posner, *The Federal Courts: Crisis and Reform* (1985) 12, 23

PAGE

Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573 (1981) 12

Reynolds & Richman, *The Non-Precedential Precedent —Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167 (1978) 12

19 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4507 (1982) 14

C. Wright, *Law of Federal Courts* (4th ed. 1983) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1467

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

Petitioner,

—against—

BANQUE DE PARIS ET DES PAYS-BAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

STATUTES AND RULES INVOLVED

This case involves the Rules of Decision Act, 28 U.S.C. § 1652 (1982), rules 90 and 133 of the Texas Rules of Appellate Procedure, section 22.001(a)(6) of the Texas Government Code and section 5.106 of the Texas Business and Commercial Code. These rules and statutes are set forth in the Appendices hereto.

COUNTERSTATEMENT OF THE CASE

This case arises out of the failure by petitioner ("Exxon") adequately to protect itself with respect to a crude oil exchange agreement that Exxon made with Houston Oil & Refining, Inc.

("Houston") in July 1981. In connection therewith, respondent ("Paribas") issued a letter of credit to Exxon, exactly as requested by its customer, Houston, but Exxon did not seek payment under the letter of credit until after its expiration date. The Fifth Circuit, applying well-settled principles of Texas letter of credit law, correctly held that Paribas was not required to pay the letter of credit. *Exxon Co., U.S.A.* v. *Banque de Paris et des Pays-Bas*, 828 F.2d 1121, *reh'g denied*, 835 F.2d 1433 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1572 (1988).

The letter of credit at issue was requested by Houston over seven years ago. On July 9, 1981, Houston submitted an application (App. 7A)[1] to Paribas for a $19,530,000 irrevocable standby letter of credit to be issued in favor of Exxon for the account of Houston in connection with an exchange of oil between the two oil companies. *Id.* Houston directed Paribas to pay the letter of credit only upon presentation by Exxon of certain specified documents, including a

> [s]tatement signed by an authorized representative [of Exxon] certifying that Houston Oil & Refining, Inc. has failed to deliver to Exxon Company, U.S.A. 558,000 barrels of [crude oil] between September and December, 1981.

Id. Houston also expressly specified that the letter of credit was to expire on October 31, 1981. *Id.*; J.A. 66.

Paribas noted the apparent discrepancy between the proposed expiration date and the above documentary provision of the letter of credit application. J.A. 67. Paribas therefore contacted Houston, before issuing the letter of credit, to verify that the conditions stated in the application were indeed what Houston intended. *Id.* Houston assured Paribas, who was not a

---

1 "App. _____" indicates reference to pages in the appendices hereto. "J.A. _____" indicates reference to pages in the Joint Appendix. "Exxon Br. _____" and "Exxon Supp. Br. _____" indicate, respectively, reference to pages in the Brief and Supplemental Brief for Petitioner. "DX _____" indicates reference to defendant's exhibits and "_____ depo. _____" indicates reference to deposition testimony, included in the record on appeal. "R. _____" indicates reference to pages in the record on appeal.

party to the oil exchange agreement between Exxon and Houston, that the terms as stated in the application were correct. J.A. 67-68; Exxon Br. 3. This confirmation from Houston was specifically noted by Paribas on Houston's application. J.A. 67-68; App. 7A.

Houston's request for the issuance of the $19,530,000 letter of credit was, in effect, a request for an extension of credit by Paribas to Houston in that amount. J.A. 67. As a result, Paribas required Houston to provide security sufficient to cover the credit, and as part of the security arrangement, Paribas blocked certain cash coming into Houston's account. *Id.*

On July 16, 1981, Paribas issued the standby letter of credit using the language supplied by Houston with respect to the documentary provisions and the expiry date. J.A. 8-9; App. 7A. Thereafter, Paribas conferred for a second time with Houston about the apparent contradiction between the documentary provision and the expiration date. J.A. 68. Houston confirmed again that no change in the expiration date was desired. *Id.*

Exxon claims that it "was unaware of the problem" in the letter of credit (J.A. 49), but the fact is that Exxon was fully aware, from the beginning of this transaction in July 1981, of the apparent contradiction in the language of the letter of credit. J.A. 68. In July 1981, Exxon had an established procedure for receiving letters of credit issued in its favor and monitoring their expiration dates. *Id.* On July 20, 1981, Don Meiers, the Exxon employee in charge of this procedure, transmitted a copy of the letter of credit here at issue to three different executives at Exxon familiar with the underlying Houston/Exxon oil exchange transaction. Meiers advised them that the letter of credit "*is due to expire October 31, 1981*" and that it covers Houston's obligation to deliver crude oil to Exxon "*between September and December 1981.*" *Id.* (emphasis added). Although what Exxon calls the "blatantly inconsistent terms" (J.A. 48) of the letter of credit were called to the attention of Exxon's management in July 1981, "[n]o one at Exxon complained or even suggested that these terms were not fully satisfactory." J.A. 68.

Exxon is one of the world's largest companies and a frequent user of letters of credit. Exxon knew from its experience that it could obtain amendment of unsatisfactory letters of credit. *Id.* In dealing with Houston, however, Exxon was essentially dealing with Joe Imparato, Houston's president and a person well-known to Exxon because he had been a former Exxon employee. J.A. 68-69. Exxon's casual approach to this letter of credit therefore suggests that Exxon was relying more on its prior business dealings and relationship with Houston and Imparato for security in this transaction than on the letter of credit issued by Paribas. J.A. 73.

It is also clear that Exxon fully understood the letter of credit had an expiry date of October 31, 1981, and that an extension of the letter of credit would be necessary to protect Exxon. Prior to October 31, 1981, "Meiers brought the problem of Exxon's exposure to loss under the [Houston/Exxon] exchange contract to the attention of higher management at Exxon," and "Exxon asked Houston to obtain an extension of the letter of credit, but did not communicate with Paribas." J.A. 68. Indeed, at no time prior to October 31, 1981, did anyone at Exxon suggest that the letter of credit would be valid through November 1981.

The letter of credit was not extended, and Exxon made no attempt to obtain payment under the letter of credit prior to its expiration.[2] As a result, during November 1981, after the credit expired, Paribas released the funds it held as security for the credit. J.A. 69.

It was not until "sometime in November" 1981 that Exxon learned Houston was not going to meet its obligation to deliver oil to Exxon. Exxon Br. 4. Recognizing that it must do something to recoup the loss which had now been fully realized, Exxon made a presentation of documents to Paribas on November 30, 1981, a month after the letter of credit had expired. J.A. 10-13. The following day, Exxon made a second

---

2 Because October 31, 1981 was a Saturday, the documents could also be presented on the next business day, Monday, November 2, 1981. J.A. 67.

presentation of documents to Paribas under the expired letter of credit. J.A. 15-17. Paribas rejected both presentations as untimely because the letter of credit had expired. J.A. 14, 18.

Exxon's reaction to Paribas' rejections was not to protest or immediately commence litigation against Paribas. Instead, Exxon negotiated a new arrangement with Houston as a way for Houston to satisfy its obligations to Exxon under, *inter alia*, the underlying oil exchange agreement here at issue. For nearly a year thereafter, Exxon collected at least $19,000,000 from Houston under that new arrangement. Imparato depo. 58. Only after Houston defaulted under that agreement did Exxon sue Paribas (on October 6, 1982) seeking, in effect, a construction and reformation of the letter of credit—which Exxon had received more than a year earlier—to make Exxon's late presentations timely. J.A. 1-7.

Exxon's action against Paribas was originally commenced in a Texas state court (J.A. 3), and was removed by Paribas to the United States District Court for the Southern District of Texas. J.A. 1, 19. After extensive discovery, both sides moved for summary judgment. R. 104, 444. The district court granted summary judgment for Exxon. J.A. 64. On appeal, however, the Fifth Circuit reversed and directed the entry of judgment for Paribas. J.A. 77.

The majority opinion below, written by Circuit Judge Rubin, discloses that the court of appeals relied heavily on principles of Texas letter of credit law in arriving at its decision.[3] The court noted, *inter alia*, that it was not called upon to clarify "a contract susceptible to more than one interpretation." J.A. 73. The court fully acknowledged that Exxon might not have been able to perform under the letter of credit as written (J.A. 65-66), but if the "expiry date did not satisfy Exxon, it simply should have declined to accept the credit and refused to deliver oil to Houston." J.A. 73. There was "no uncertainty on the face of the letter as to its expiration date" which was "as certain as words permit." *Id.* The court thus held that the letter of credit

---

3 *See infra* Point II.

"required no construction and that it terminated on its express expiry date." J.A. 75.

The court also noted that it was not called upon to deal with claims of fraud, inadvertence or mistake:

> Exxon does not suggest that Paribas acted fraudulently. Nor does Exxon allege that Houston specified the expiration date of October 31 as the result of inadvertence or mistake, or that Exxon was mistaken as to that date when it accepted the letter.

J.A. 74. The court rejected Exxon's assertion that Paribas had a duty to Exxon to "make sense" of Houston's application for the letter of credit.[4] *Id.* The court did, however, find—based on Texas law—that Paribas had a duty of good faith to Houston, the bank's customer, and that Paribas discharged that duty by checking with Houston both before and after issuing the credit to make sure that the terms specified in the application were what Houston intended. *Id.* In short, the court below concluded:

> In letter-of-credit transactions, as in many other legal areas, certainty of result and practicality of performance by laymen are of paramount importance. As Exxon asserts, it was required to comply with "whatever requirements that Paribas established" "to the last comma, the last semicolon, . . . and, if they [did] that, they [were] entitled to be paid." It follows that, if Exxon did not do that, it was not entitled to be paid.

J.A. 75.

After judgment was rendered below, Exxon filed with the Fifth Circuit a suggestion for en banc consideration. Exxon Br. 7. On December 8, 1987, the Fifth Circuit denied the suggestion for an en banc rehearing and, treating it as a petition for a panel rehearing, denied that application also. J.A. 78.

---

4 Exxon notes that Paribas received a fee for issuing the letter of credit. Exxon Br. 3. That fee, however, was paid to Paribas by Houston, its customer, not by Exxon and was in accord with the usual rate charged to Houston for letters of credit. J.A. 67; DX 4.

In January 1988, an attorney for The Plains National Bank of Lubbock, Texas telephoned Exxon's counsel by mistake and advised him of an opinion issued on November 17, 1987, by the Court of Appeals for the Seventh District of Texas at Amarillo (the "Amarillo court"), one of fourteen intermediate appellate state courts in Texas. J.A. 29, 37-38; *Kerr Constr. Co.* v. *Plains Nat'l Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, writ denied). At the time, the *Kerr* opinion was an unpublished opinion and had no precedential value in the State of Texas. J.A. 26-27, 36. The fact that *Kerr* was not published was not happenstance or the result of an oversight by the Amarillo court to forward the opinion for publication. It was the result of a deliberate decision by the Amarillo court that the opinion did not meet the standards for publication under Rule 90(c) of the Texas Rules of Appellate Procedure (App. 3A) and, therefore, was not to be regarded as part of the jurisprudence of the State of Texas. J.A. 36.

Nevertheless, Exxon brought the unpublished opinion to the attention of the Fifth Circuit on January 12, 1988, by filing two motions: a motion to recall the issuance of the Fifth Circuit's mandate, and a motion for leave to file a second suggestion for an en banc rehearing. J.A. 26, 39. While the motions were pending below, the Amarillo court, on January 27, 1988, reconfirmed its initial determination not to publish *Kerr* by denying a motion to publish the opinion. App. 9A. Two weeks after that, the court below denied Exxon's motions, noting, *inter alia*, that Rule 90(i) of Texas Rules of Appellate Procedure provides that unpublished opinions shall not be cited as authority by counsel or by a court. J.A. 79-80; App. 4A.

On March 4, 1988, Exxon filed its Petition for Certiorari in this Court and simultaneously embarked on a truly extraordinary campaign to try to obtain from the Texas state courts some advantage in connection with this litigation. The *Kerr* case was then pending before the Texas Supreme Court on an application by The Plains National Bank of Lubbock, the losing party in *Kerr*, for a writ of error. On March 4, 1988, Exxon, as "amicus curiae," filed a motion in the Texas Supreme Court seeking publication of the Amarillo court's opinion. App. 10A. Exxon

took this step so that the *Kerr* opinion would be available to assist Exxon in the litigation now before this Court.

Exxon also filed on March 4, 1988 a brief in the Texas Supreme Court in which it urged that court to grant the application for a writ of error and to write an opinion affirming the Amarillo court's decision in *Kerr*, or alternatively, to order the *Kerr* opinion published if the application for a writ of error was refused. Brief of Amicus Curiae Exxon Co., U.S.A., *Plains Nat'l Bank* v. *Kerr Constr. Co.*, No. C-7185 (Tex., filed Mar. 4, 1988). A few days thereafter, Exxon filed a motion to supplement its papers in the Texas Supreme Court in order to file with that court a copy of the Petition for Certiorari which Exxon had filed here. Motion to Supplement of Amicus Curiae Exxon Co., U.S.A., *Plains Nat'l Bank* v. *Kerr Constr. Co.*, No. C-7185 (Tex., filed Mar. 8, 1988).

On April 27, 1988, two days after this Court granted certiorari, the Texas Supreme Court granted Exxon's motion to supplement and then denied, on the merits, Exxon's supplemented motion to publish the *Kerr* opinion. App. 13A. At the same time the Texas Supreme Court denied the application for a writ of error, thereby indicating that the *Kerr* decision of the Amarillo court was incorrect in some unspecified respect. *Id.*[5]

Rebuffed in its initial attempt to get the *Kerr* opinion published, Exxon then filed, on May 6, 1988, a motion for rehearing of its motion to publish in the Texas Supreme Court based on the fact that certiorari had been granted in this case. Motion for Rehearing of Amicus Curiae Exxon Co., U.S.A., *Plains Nat'l Bank* v. *Kerr Constr. Co.*, No. C-7185 (Tex., filed May 6, 1988). On May 25, 1988, however, the Texas Supreme Court denied Exxon's motion for rehearing for lack of jurisdiction. App. 14A. One week later, that court also denied a motion for rehearing on the application for a writ of error filed by The Plains National Bank of Lubbock. App. 16A.

Having thus failed in its effort to obtain assistance from the Texas Supreme Court, Exxon proceeded to "appeal downwards" to the Amarillo court. Although *Kerr* was not then

---

5 *See infra* Point III.

pending in the intermediate appellate court, Exxon filed a motion in that court on June 2, 1988 to obtain publication of the *Kerr* opinion. App. 18A. The basic reason Exxon there assigned for seeking publication of the *Kerr* opinion was the pendency of this case in this Court. App. 19A-20A.

After Exxon filed its motion to publish, the City of Lubbock and the Kerr Construction Company, the winning parties in *Kerr*, also filed a motion to publish the *Kerr* opinion, even though they had not previously sought such action from either the Amarillo court or the Texas Supreme Court while the *Kerr* case was pending.[6] Motion to Publish of the City of Lubbock and Kerr Construction Company, *Kerr Constr. Co.* v. *Plains Nat'l Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, writ denied) (filed June 13, 1988). On July 6, 1988, five weeks after Exxon's motion was filed, the Amarillo court granted the motion of the City and of Kerr to publish the *Kerr* opinion, and denied the Exxon motion as moot. Exxon Supp. Br. 1.

SUMMARY OF ARGUMENT

When *Kerr* was called to the attention of the Fifth Circuit and when certiorari was granted by this Court, the *Kerr* opinion was unpublished and, under Texas law, devoid of precedential value. *Berry* v. *Berry*, 647 S.W.2d 945 (Tex. 1983); *Wheeler* v. *Aldama-Luebbert*, 707 S.W.2d 213 (Tex. App.—Houston 1986); Tex. R. App. P. 90(i). On July 6, 1988, however, the Amarillo court ordered the *Kerr* opinion published. Thus, issues relating to *Kerr* as an unpublished opinion are moot. *See Honig* v. *Doe*, 108 S. Ct. 592 (1988); *De Funis* v. *Odegaard*, 416 U.S. 312 (1974). The fundamental issue now before the Court is whether any purpose would be served by having the court below reconsider its opinion in the light of *Kerr*. The answer is no.

---

6 As noted above, the Amarillo court had previously re-confirmed its initial refusal to publish the *Kerr* opinion at a time when the *Kerr* case was still active and when publishing the opinion might have affected action that the Texas Supreme Court was requested to take in the application for a writ of error filed by The Plains National Bank of Lubbock. App. 9A.

A federal court sitting in diversity is required to apply state law as enunciated by the highest court of the state. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). *Kerr*, however, ignores the well-settled principles of letter of credit law enunciated by the Texas Supreme Court in a series of cases decided over the past ten years and consistently applied by other Texas courts. *See CKB & Assocs., Inc.* v. *Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653 (Tex. 1987); *Fina Supply, Inc.* v. *Abilene Nat'l Bank*, 726 S.W.2d 537 (Tex. 1987); *Westwind Exploration, Inc.* v. *Homestate Savs. Ass'n*, 696 S.W.2d 378 (Tex. 1985); *Temple-Eastex, Inc.* v. *Addison Bank*, 672 S.W.2d 793 (Tex. 1984); *Republic Nat'l Bank* v. *Northwest Nat'l Bank*, 578 S.W.2d 109 (Tex. 1979). These principles require that a beneficiary who fails strictly to comply with the terms and conditions of a letter of credit is not entitled to receive payment under it. *Fina*, 726 S.W.2d at 542; *Westwind*, 696 S.W.2d at 381; *Temple-Eastex*, 672 S.W.2d at 795. They also mandate that the issuer of a letter of credit incurs no liability on demands for payment presented after the expiry date. *Temple-Eastex*, 672 S.W.2d at 795; *see also Cypress Bank* v. *Southwestern Bell Tel. Co.*, 610 S.W.2d 185, 187 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *Siderius, Inc.* v. *Wallace Co.*, 583 S.W.2d 852, 860 (Tex. Civ. App.—Tyler 1979, no writ).

These principles are not altered or modified by the fact that the beneficiary is unable to comply with conditions for payment prior to the expiry date of the letter of credit. *Liberty Nat'l Bank & Trust Co.* v. *Bank of Am. Nat'l Trust & Savs. Ass'n*, 218 F.2d 831, 840-41 (10th Cir. 1955), *cited with approval in Siderius, Inc.* v. *Wallace Co.*, 583 S.W.2d 852, 860 (Tex. Civ. App.—Tyler 1979, no writ); *Hyland Hills Metro. Park & Recreational Dist.* v. *McCoy Enters., Inc.*, 554 P.2d 708 (Colo. Ct. App. 1976), *cited with approval in Cypress Bank* v. *Southwestern Bell Tel. Co.*, 610 S.W.2d 185, 187 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

In the absence of fraud, mistake or scrivener's error, courts will not reform letters of credit. *See, e.g., Fina*, 726 S.W.2d at 541; *Champlin Oil & Ref. Co.* v. *Chastain*, 403 S.W.2d 376, 382-83 (Tex. 1966); *Continental Oil Co.* v. *Doornbos*, 402

S.W.2d 879, 883 (Tex. 1966). Under well-settled contract principles, a letter of credit which is impossible of performance *ab initio* is void and there are no obligations to enforce. *See United States* v. *Ellicott*, 223 U.S. 524, 541 (1912); *Milam Bldg. Co.* v. *Dannelley*, 57 S.W.2d 345, 347 (Tex. Civ. App.—Waco 1933); *Thompson* v. *Waits*, 159 S.W. 82, 84 (Tex. Civ. App.—Austin 1913).

Additionally, the Texas Supreme Court denied an application for a writ of error in *Kerr*, thereby holding, *inter alia*, that *Kerr* was erroneous. Tex. Gov't Code Ann. § 22.001(a)(6) (Vernon 1986); Tex. R. App. P. 133(a).

All of this reveals there is persuasive evidence that the Texas Supreme Court would apply letter of credit law in the way the Fifth Circuit did and not as the *Kerr* court did. The subsequent publication of the *Kerr* opinion by the Amarillo court does not correct any error in that opinion. It was a flawed opinion when issued, it was a flawed opinion when the Texas Supreme Court denied the application for a writ of error, and it remains a flawed opinion. Under the circumstances, no purpose would be served in remanding the case for further proceedings in the light of *Kerr*, and the judgment below should be affirmed.

ARGUMENT

I. THE ISSUES RELATING TO UNPUBLISHED DECISIONS ARE MOOT

At the time the *Kerr* opinion was called to the attention of the Fifth Circuit, the Amarillo court had decided, pursuant to Rule 90(e) of the Texas Rules of Appellate Procedure, that the opinion should not be published and had therefore endorsed the words "Do not publish" at the foot of the opinion. J.A. 36. Such a designation carried with it certain consequences under Texas law. Specifically, the opinion was not to be cited as authority either by counsel or by a court, and was regarded by the Texas courts as being wholly without precedential value.

Berry v. *Berry*, 647 S.W.2d 945 (Tex. 1983); *Wheeler* v. *Aldama-Luebbert*, 707 S.W.2d 213 (Tex. App.—Houston 1986); Tex. R. App. P. 90(i).

A state is free to designate from among potentially available sources of law, those which it regards as forming a part of its jurisprudence and, in particular, a state need not accord precedential value to each and every decision rendered by its courts. *See, e.g.*, *King* v. *Order of United Commercial Travelers of Am.*, 333 U.S. 153 (1948). In fact, a substantial number of jurisdictions other than Texas do not accord precedential effect to "Do not publish" opinions.[7] The reasons for the wide-spread adoption of such rules are well known and have received extensive comment.[8] Moreover, under the rationale of *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), as elaborated in *Hanna* v. *Plumer*, 380 U.S. 460 (1965), it is clear that federal courts sitting in diversity are required to follow state law with respect to such unpublished opinions, because the failure to do so would inevitably create two separate bodies of law, one in the state courts and the other in the federal courts. This, in turn, would lead to the very forum shopping and inequitable administration of the laws which *Erie* was intended to preclude.

---

7 *See, e.g.*, 1st Cir. R. 36.2(b)(6); 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2); 8th Cir. R. 8(i); 9th Cir. R. 36-3; 10th Cir. R. 36.3; D.C. Cir. Rule 11(c); Fed Cir. R. 18(c); Ariz. R. Civ. App. P. 28; Ark. Sup. Ct. and Ct. App. R. 21; Cal. Ct. R. 976, 977; Colo. App. R. 35; D.C. Ct. App. R. 36, 28(h); Haw. R. App. P. 35; Ind. R. App. P. 15; Kan. Sup. Ct. R. 7.04; Ky. R. Civ. P. 76.28; La. Ct. App. R. 2-16.2, 2-16.3; Md. R. 1092; Mich. App. R. 7.215; Miss. Sup. Ct. R. 35; Nev. Sup. Ct. R. 123; N.J. Ct. R. 1:36-2, 1:36-3; N.M. R. App. P. 12-405; Okla. R. Civ. App. P. 1.200; Wis. R. App. P. 809.23.

8 *See generally* R. Posner, *The Federal Courts: Crisis and Reform* (1985); Nichols, *Selective Publication of Opinions: One Judge's View*, 35 Am. U.L. Rev. 909 (1982); Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1183 (1978); Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573 (1981); Note, *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L. Rev. 128 (1977).

When the Court granted certiorari in this case, issues concerning the use of such "Do not publish," non-precedential opinions were present. However, the *Kerr opinion, unpublished* at the time certiorari was granted, has become a published opinion by the direction of the Amarillo court. Exxon Supp. Br. 1. Hence, there is no case or controversy concerning *Kerr* as an unpublished opinion, and issues related thereto are moot. *See, e.g., Honig* v. *Doe*, 108 S. Ct. 592 (1988); *De Funis* v. *Odegaard*, 416 U.S. 312 (1974). The question now is whether any purpose would be served by the court below reconsidering its decision in light of the now-published *Kerr* opinion. We submit that there would not. The Fifth Circuit was clearly correct in its application of Texas law. The *Kerr* opinion provides no arguments that have not already been advanced in the Fifth Circuit. *Kerr* is flawed as authority because the Texas Supreme Court has held that there is error in the opinion, and belated publication does not correct such error.

II. THE FIFTH CIRCUIT'S DECISION IS CORRECT BASED ON TEXAS LAW AS ENUNCIATED BY THE TEXAS SUPREME COURT

This is a diversity case which was briefed and decided in the Fifth Circuit on the basis of Texas law. Under *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938), a federal court sitting in diversity is required to apply state law as enunciated by the highest court of the state in question. Where the highest court of the state has not spoken on a particular issue, the diversity court is required to predict what the highest court of the state would decide if the issue were presented to it:

> [When] the underlying substantive rule involved is based on state law the State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.

Commissioner v. *Estate of Bosch*, 387 U.S. 456, 465 (1967); *see also Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198 (1956); *King* v. *Order of United Commercial Travelers of Am.*, 333 U.S. 153 (1948).[9]

When a federal court is exercising its diversity jurisdiction:

> the federal judge need no longer be a ventriloquist's dummy. Instead he is free, just as his state counterpart is, to consider all the data the highest court of the state would use in an effort to determine how the highest court of the state would decide. This is as it should be. Unless this much freedom is allowed the federal judge, the Erie doctrine would simply have substituted one kind of forum-shopping for another.

C. Wright, *Law of Federal Courts* 373-74 (4th ed. 1983) (footnote omitted). Thus, under *Erie* a diversity court may consider decisions of intermediate appellate state courts but is not bound by them and, in fact, must disregard them if " '*convinced by other persuasive data that the highest court of the state would decide otherwise.*' " *Bosch*, 387 U.S. at 465 (quoting *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940)) (emphasis added in *Bosch*); *see also* 19 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4507, at 86-91 (1982).

The Fifth Circuit comprehensively evaluated and applied Texas law to resolve the issues presented to it. Throughout its opinion the court below specifically relied upon many Texas statutory and case authorities, and the fact that the court did not always cite a Texas authority and sometimes cited a non-Texas authority such as a treatise, does not in any way derogate from the fact that its decision was based on principles of Texas

---

9 The cases relied on by Exxon to establish the effect a diversity court must give to state intermediate appellate court decisions (Exxon Br. 16) do not reflect this Court's more current authority, such as *Bosch*, which Exxon fails even to cite. The more recent decisions of this Court, cited in the text, have clearly shifted away from emphasizing a mechanical application of lower court decisions.

law—not on "general commercial law." The *Kerr* opinion, however, stands in startling contrast to Texas letter of credit law and ignores the well-established legal principles governing letters of credit that have been developed by the Texas Supreme Court.

In the past ten years, the Texas Supreme Court has issued five decisions which substantively deal with letters of credit. *CKB & Assocs., Inc.* v. *Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653 (Tex. 1987); *Fina Supply, Inc.* v. *Abilene Nat'l Bank*, 726 S.W.2d 537 (Tex. 1987); *Westwind Exploration, Inc.* v. *Homestate Savs. Ass'n*, 696 S.W.2d 378 (Tex. 1985); *Temple-Eastex, Inc.* v. *Addison Bank*, 672 S.W.2d 793 (Tex. 1984); *Republic Nat'l Bank* v. *Northwest Nat'l Bank*, 578 S.W.2d 109 (Tex. 1979). The opinion below is fully in accord with the broad panoply of legal principles governing letters of credit announced in those cases; by contrast, these principles are wholly absent from *Kerr*.[10]

For example, the Fifth Circuit recognized that letters of credit in Texas are subject to, and must comply with, Texas statutory provisions, including the Texas Business and Commercial Code. J.A. 67, 70, 71, 74. The court thereby adhered to the dictates of the Texas Supreme Court that "Chapter 5 of the Uniform Commercial Code governs letters of credit." *Temple-Eastex*, 672 S.W.2d at 797; *see also Fina*, 726 S.W.2d at 542; *Westwind*, 696 S.W.2d at 381; *Republic Nat'l Bank*, 578 S.W.2d at 112-13. Indeed, every statute used by the Fifth Circuit in its opinion was a Texas statute. By contrast, however, the *Kerr* court failed to apply, or even acknowledge the exist-

---

10 Although Exxon chides the court below for allegedly not applying principles of Texas letter of credit law, Exxon itself never cites to this Court, much less discusses, *three* of the principal and most recent letter of credit decisions of the Texas Supreme Court—*Fina*, *Westwind* and *CKB & Assocs.* Similarly, the Amarillo court in *Kerr* fails even to make a reference to *Fina*, *Republic Nat'l Bank* or *CKB & Assocs.* (J.A. 29-36) and, while noting the Plains National Bank's reliance on *Westwind*, fails substantively to distinguish or otherwise deal with the case. *See* J.A. 34.

ence of, the Texas statutory provisions dealing with letters of credit. J.A. 29-36.

The Fifth Circuit recognized that the issuer of a letter of credit "has no obligation to pay unless the beneficiary strictly complies with the conditions contained in the credit." J.A. 71. The court thereby adhered to the Texas law that a beneficiary who "fail[s] to strictly comply with the terms and conditions of the letter of credit [is] not entitled to receive payment under it." *Fina*, 726 S.W.2d at 542; *see also Westwind*, 696 S.W.2d at 381; *Temple-Eastex*, 672 S.W.2d at 795.[11] By contrast, the *Kerr* court fails to apply or even note the Texas rule requiring strict compliance with letter of credit terms. J.A. 29-36.

The Fifth Circuit's decision below is fully in accord with Texas law that the "issuer of [a] letter of credit incurs no liability on demands for payment presented after expiration date." *Temple-Eastex*, 672 S.W.2d at 795; *see also Cypress Bank* v. *Southwestern Bell Tel. Co.*, 610 S.W.2d 185, 187 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *Siderius, Inc.*, 583 S.W.2d at 860. The *Kerr* court, however, failed to acknowledge that the Texas Supreme Court requires payment documents under a letter of credit to be presented before the expiry date. J.A. 29-36.

The Fifth Circuit also followed Texas statutory and common law by refusing to modify the terms of, or change, the letter of credit without a finding that *each* of the three parties to the letter of credit transaction (*i.e.*, the bank, the beneficiary and the

---

11 Other Texas cases, such as *Siderius, Inc.* v. *Wallace Co.*, 583 S.W.2d 852, 862 (Tex. Civ. App.—Tyler 1979, no writ), and *BA Commercial Corp.* v. *Hynutek, Inc.*, 705 S.W.2d 713, 715 (Tex. App.—Dallas 1986, no writ), are to the same effect. Indeed, *BA Commercial*, although relied on by Exxon (Exxon Br. 5, 19), actually supports Paribas' position in this case. *BA Commercial* dealt with a letter of guarantee, *not* a letter of credit, and the court made a specific point of distinguishing the two. *See* 705 S.W.2d at 715. Furthermore, the court indicated that, had the letter of guaranty been a letter of credit, there could *not* have been any recovery under it because the beneficiary had failed to strictly comply with the terms of the instrument—even though the beneficiary could not have done so. *Id.* at 715-16.

account party) agreed to the modifications. J.A. 73-75. Texas law on this subject, as expressed by the Texas Supreme Court, could not be any clearer: "[O]nce established, an irrevocable [letter of] credit can be modified by the issuer only with the consent of the beneficiary and the account party." *Fina*, 726 S.W.2d at 541-42; *see also* Tex. Bus. & Com. Code Ann. § 5.106(b) (Vernon 1968). In *Kerr*, however, the court modified the letter of credit over the express objection of the issuer.

The Fifth Circuit recognized (J.A. 71) the Texas principle that an issuer of a letter of credit appropriately insists upon receiving documents that strictly conform to the requirements of the instrument because an issuer who pays against nonconforming documents loses its right to reimbursement from the account party. *See, e.g.*, *Fina*, 726 S.W.2d at 542; Tex. Bus. & Com. Code Ann. § 5.114(c) (Vernon 1968). The *Kerr* opinion nowhere explains how a bank which pays a letter of credit presented after the expiry date specified in the letter of credit can obtain reimbursement from the bank's customer.

The Fifth Circuit recognized (J.A. 72) the Texas principle that a standby letter of credit is regarded as an extension of credit by the bank to the account party and therefore is subject to the statutory and regulatory loan limits imposed upon lending institutions. *See, e.g.*, *Republic Nat'l Bank*, 578 S.W.2d at 114. For this reason, among others, it is imperative for a bank to know with certainty when its obligation is at an end. Significantly, the *Kerr* court—like the district court in this case—made no attempt to specify any new or revised expiry date for termination of the bank's obligation. Nor did *Kerr* or the district court here suggest any way in which a bank can determine, short of years of litigation, when its obligation under an expired letter of credit ceases if the stated expiry date is not given effect.

The Fifth Circuit recognized (J.A. 67-75) that Texas courts routinely look to, and rely on, letter of credit decisions and authorities from jurisdictions outside Texas in resolving issues of Texas letter of credit law, inasmuch as the statutory laws governing letters of credit (*i.e.*, Article 5 of the Uniform Commercial Code) are essentially the same throughout the United

States. *See, e.g., CKB & Assocs.*, 734 S.W.2d at 655; *Westwind*, 696 S.W.2d at 381; *Temple-Eastex*, 672 S.W.2d at 797; *Republic Nat'l Bank*, 578 S.W.2d at 112-16; *Cypress Bank*, 610 S.W.2d at 187; *Siderius*, 583 S.W.2d at 859-62. *Kerr*, however, makes no reference to the cases from other jurisdictions—including cases used approvingly by Texas courts—which have uniformly held that the impossibility of compliance with conditions of a letter of credit prior to its expiry date is not grounds for ignoring or changing that date. *See Liberty Nat'l Bank & Trust Co.* v. *Bank of Am. Nat'l Trust & Savs. Ass'n*, 218 F.2d 831, 840-41 (10th Cir. 1955), *cited with approval in Siderius, Inc.* v. *Wallace Co.*, 583 S.W.2d 852, 860 (Tex. Civ. App.—Tyler 1979, no writ); *Hyland Hills Metro. Park & Recreational Dist.* v. *McCoy Enters., Inc.*, 554 P.2d 708 (Colo. Ct. App. 1976), *cited with approval in Cypress Bank* v. *Southwestern Bell Tel. Co.*, 610 S.W.2d 185, 187 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).[12]

The Fifth Circuit recognized (J.A. 65, 72) the Texas principle that clarity and certainty in letter of credit transactions are particularly important because the utility of letters of credit lies in the assurance that payment will be made upon compliance with the specified terms without delay or litigation. *See, e.g., CKB & Assocs.*, 734 S.W.2d at 655; *Fina*, 726 S.W.2d at 541 ("[A] bank must be able to predict with certainty the possible range of its liability and must be assured that the scope of this liability will not be altered."); *Republic Nat'l Bank*, 578 S.W.2d at 115. By contrast, *Kerr* affirmatively creates just such uncertainty and unpredictability in these vital matters.

Judicial reformation of the letter of credit in this case, where there is no fraud, scrivener's error or mutual mistake, is without justification under Texas law.[13] *See, e.g., Fina*, 726 S.W.2d

---

12 *See also Insurance Co. of N. Am.* v. *Heritage Bank, N.A.*, 595 F.2d 171, 173-76 (3d Cir. 1979); *AMF Head Sports Wear, Inc.* v. *Ray Scott's All-American Sports Club, Inc.*, 448 F. Supp. 222 (D. Ariz. 1978).

13 It may well be that *Kerr* itself involved a mutual mistake because one of the few cases upon which the *Kerr* court based its decision was a mutual mistake case. *See Osburn* v. *Smart*, 58 S.W.2d 1073 (Tex. Civ. App.—Fort Worth 1932, writ dism'd); J.A. 33.

at 541; *Champlin Oil & Ref. Co.* v. *Chastain*, 403 S.W.2d 376, 382-83 (Tex. 1966); *Continental Oil Co.* v. *Doornbos*, 402 S.W.2d 879, 883 (Tex. 1966). Provisions in a document do not always have to be reconciled if to do so would impose obligations which were not agreed to by one of the parties. In such a case, "it inevitably follows that the alleged contract should have been held void for uncertainty." *United States* v. *Ellicott*, 223 U.S. 524, 541 (1912). This is also a long-standing rule in Texas:

> If the language used admits of but one meaning, and the different clauses of a written instrument are plainly contradictory, they mutually destroy each other and render the instrument void.

Thompson v. *Waits*, 159 S.W. 82, 84 (Tex. Civ. App.—Austin 1913); *see also Milam Bldg. Co.* v. *Dannelley*, 57 S.W.2d 345, 347 (Tex. Civ. App.—Waco 1933).

Unlike the *Kerr* court, whose fundamental error was the failure to apply Texas letter of credit principles to its decision, the Fifth Circuit overlaid all of the principles of Texas letter of credit law on the fact pattern of the dispute between Paribas and Exxon. The court below concluded that Paribas' conduct was entirely consistent with its obligations as the issuer—the bank accurately conveyed to Exxon the language provided by Houston for the letter of credit terms, and Paribas twice made sure that the facially conflicting language requested by Houston was in fact exactly what Houston wanted.[14] Having twice received confirmation that this was exactly how Houston wanted the letter of credit to read, Paribas is entitled, under Texas letter of credit law, to the assurance "that the scope of [its] liability will not be altered." *Fina*, 726 S.W.2d at 541.

---

14 In these circumstances, Exxon's contention that the letter of credit should be construed against Paribas because it was the author (*see* Exxon Br. 5, 18) has no application to this case because Houston, not Paribas, provided the essential language used in the letter of credit. *Compare* App. 7A *with* J.A. 8-9.

III. THE TEXAS SUPREME COURT HAS CONFIRMED THAT THERE IS ERROR IN THE *KERR* OPINION

Exxon incorrectly contends that the Texas Supreme Court "denied review" of the *Kerr* case and that a diversity court is therefore bound by the *Kerr* opinion. Exxon Br. 19-20. Exxon's premise is that by "denying review" the Texas Supreme Court somehow endorsed the *Kerr* opinion. The opposite is true, however. What the Texas Supreme Court actually did was to deny an application for a writ of error, and such "writ denied" action means that the Texas Supreme Court found that the *Kerr* opinion contained one or more errors of law.

The appellate jurisdiction of the Texas Supreme Court contained in section 22.001(a)(6) of the Texas Government Code was amended in 1987 to give that court discretionary, instead of obligatory, review power where the lower court committed reversible error.[15] *See* Carlson & Garcia, *The New Discretionary Review Powers of the Texas Supreme Court*, 1987 Tex. B.J. 1201, 1202 (Dec. 1987). The amendment permits the Texas Supreme Court to decline review of an erroneous decision unless the error "is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction" (excluding cases where the jurisdiction of the court of appeals is final by statute). App. 2A; *see also* Carlson & Garcia, *supra*. Under this subdivision, the Texas Supreme Court could find errors of law—even reversible errors—in a court of appeals decision, but decline to take the case on appeal because the errors were regarded as not being of such importance to the jurisprudence of the state as to require correction.

Where an application for a writ of error reveals that the judgment appealed from is correct and that the principles of law in the court of appeals' opinion were correctly determined, the application is "refused". By contrast, where an application for a writ of error reveals that the opinion appealed from is, in

---

15 The other five subdivisions of section 22.001(a), reprinted in the Appendix at 2A, involve aspects of the appellate jurisdiction of the Texas Supreme Court not relevant here.

some respect erroneous, but the Texas Supreme Court does not wish to exercise its discretionary power to review, the application is "denied". Tex. R. App. P. 133(a); Tex. Gov't Code Ann. § 22.001(a)(6) (Vernon 1986); Carlson & Garcia, *supra* p. 20; App. 2A, 5A.

Significantly, the Texas Supreme Court in *Kerr* did not "refuse" the application for a writ of error. The court, therefore, did *not* find that the judgment of the Amarillo court was correct and that the legal principles on which it was based were correctly determined. Instead, the "writ denied" determination in *Kerr* reveals that the Texas Supreme Court found the opinion of the Amarillo court to be erroneous but that, as the Texas Supreme Court stated in its April 27, 1988 order, the error was not "of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals." App. 13A.

When the Texas Supreme Court acted, the *Kerr* opinion was not a part of the jurisprudence of the State of Texas because it was unpublished. J.A. 36; *Berry* v. *Berry*, 647 S.W.2d 945 (Tex. 1983); *Wheeler* v. *Aldama-Luebbert*, 707 S.W.2d 213 (Tex. App.—Houston 1986). By definition, an error—even a reversible error—in an opinion which is not a part of the jurisprudence of Texas cannot have any importance to the jurisprudence of Texas. As noted in Carlson & Garcia, *supra* p. 20, at 1203-04 (footnotes omitted):

> Under [Texas' new discretionary review] system an unpublished opinion adds to the justification for refusing to grant the application for review.
>
> If one defines "jurisprudence" as a "body of law" it is doubtful that an unpublished opinion could impact that law except of course as between the immediate litigants. Rule 133(a) as amended no longer focuses upon error in the judgment which affects the immediate parties. Furthermore, an unpublished opinion cannot be used as authority by the bench or bar. Thus, an unpublished opinion has no *stare decisis* value.

Indeed, the Texas Supreme Court punctuated the conclusion that the unpublished *Kerr* opinion has no importance to the jurisprudence of Texas when, on April 27, 1988, simultaneously with the denial of the application for a writ of error, the Texas Supreme Court also refused to order publication of the *Kerr* opinion. App. 13A. The court thereby affirmatively kept the *Kerr* opinion out of the jurisprudence of Texas. *See, e.g., Berry*, 647 S.W.2d at 947.

IV. LATE PUBLICATION OF THE *KERR* OPINION DOES NOT INVALIDATE THE FIFTH CIRCUIT'S DECISION

The Amarillo court's decision to publish *Kerr*—made over two months after the Texas Supreme Court found the opinion to be erroneous—obviously does not correct the errors in the opinion. However, publishing the opinion does serve to focus attention on the all-out campaign waged by Exxon to try to get the *Kerr* opinion published after the fact to influence this Court's decision. Indeed, the jurisprudential vice of just such activity was noted by Judge Posner in his analysis of the federal courts:

> One aspect of the current nonpublication practice deserves more critical attention than it has received: the practice of routinely granting requests to publish unpublished opinions. It is questionable not only because it can lead to publication of substandard opinions but also because it can lead to bias in the creation of precedents. Institutions with recurrent litigation in particular areas—government agencies, insurance companies, railroads, and so forth—sometimes find it worth their while to review unpublished opinions systematically and request publication of those that favor their litigation interests. Unless their opponents are also repeat litigants with an interest in precedent, an unrepresentative sample of unpublished opinions will be given precedential status through publica-

> tion, and the weight of precedent in particular areas will be distorted.

R. Posner, *supra* p. 12 n.8, at 126.

Even as a published opinion, *Kerr* does not require any contrary result from that rendered by the court below. Apart from the fact that *Kerr* is not in accord with current Texas Supreme Court doctrine on letters of credit, the *Kerr* case lacks features which make the present case unique. The *Kerr* opinion does not suggest that the beneficiary of the letter of credit, like Exxon, noted the expiry date and payment conditions when the letter of credit was first delivered and acknowledged in writing that the credit would expire on the date set forth in the letter of credit. There is no indication in *Kerr* that the issuer, like Paribas, confirmed on two occasions with its customer that the expiry date stated in the credit was the one intended by the customer. And *Kerr* does not indicate that the beneficiary, like Exxon, may have been relying on things other than the letter of credit for security.

The fact remains that the *Kerr* opinion was a flawed opinion when it was issued, it was a flawed opinion when the Texas Supreme Court acted in April 1988, it was declared by the Texas Supreme Court to be a flawed opinion, and it is still a flawed opinion. Subsequent publication of an opinion that the Texas Supreme Court has said is wrong neither makes the opinion correct nor requires that diversity courts follow it.

V. THERE IS NO BASIS FOR CERTIFICATION TO THE TEXAS SUPREME COURT

Exxon's suggestion (Exxon Br. 46) that this Court consider certification to the Texas Supreme Court, based on Exxon's claim that the Fifth Circuit's decision did not "acknowledge the primacy of [Texas] state law" and "exhibited an unwillingness to undertake the deep, patient, and probing analysis of state law that *Erie* requires" is specious. Exxon's implication that the Fifth Circuit is not to be trusted to apply Texas law and that this

Court should preempt the Fifth Circuit by itself certifying an issue of state law to the Texas Supreme Court is wholly unjustified. As demonstrated above, the Fifth Circuit's decision was squarely based on Texas law, exhibited none of the reluctance to examine Texas law which Exxon attributes to it, and was palpably correct.

CONCLUSION

For each of the reasons assigned, the judgment below was correct and should be affirmed.

Respectfully submitted,

STANLEY GODOFSKY
Counsel of Record
DONALD F. LUKE
MARY LEE DONAHUE
KENNETH L. MILLER
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 878-8000

PAUL J. MISHKIN
91 Stonewall Road
Berkeley, California 94705

ROBERT HAYDEN BURNS
CONSTANCE O'DOHERTY BARNES
Butler & Binion
1600 Allied Bank Plaza
Houston, Texas 77002

RALPH J. AIELLO
Banque Paribas
787 Seventh Avenue
New York, New York 10019

Attorneys For Respondent

APPENDICES

APPENDIX 1

Supplement to Appendix 1 of Respondent's Brief in Opposition Relating to the Parent, Principal Affiliates and Non-Wholly-Owned Subsidiaries of
BANQUE PARIBAS
(formerly called Banque de Paris et des Pays-Bas)

Principal Affiliates and Subsidiaries Not Wholly-Owned:

Delete:
Banque Paribas Sverige
C.G.I.B. Banque pour la Reconstruction et l'Equipement
"Cimopar" Compagnie d'Investissements Movoliers de Paribas
C.K.S. France
CN Industries
Compagnie Arabe de Financement International
Intec Systems, Inc.
Omnium de Participations Bancaires Paribas "OPB-Paribas"
Omnium de Participations Financieres et Industrielles de Paribas "Opfi-Paribas"
Opafi
OTH
S.A.I.C. Velcorex

Add:
Cap Groupe PLT
Courcoux Bouvet
ETKC
GB Inno B.M.
Laiteries Emile Bridel
Nouvene Cofimer
Opatra
Paribas Participations S.A.
Paribas U.S.A.
Teleplastics Industries

APPENDIX 2

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

* * *

§ 22.001. Jurisdiction

(a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:

(1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;

(2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;

(3) a case involving the construction or validity of a statute necessary to a determination of the case;

(4) a case involving state revenue;

(5) a case in which the railroad commission is a party; and

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

(b) A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court either by writ

of error or by certificate from the court of appeals, but the court of appeals may certify a question of law arising in any of those cases at any time it chooses, either before or after the decision of the case in that court.

(c) An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

(d) The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

* * *

Rule 90. Opinions, Publication and Citation

(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion which should not be published.

(b) Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. The names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.

(c) Standards for Publication. An opinion by a court of appeals shall be published only if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

(d) Concurring and Dissenting Opinions. Any justice may file an opinion concurring in or dissenting from the decision of the court of appeals. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in paragraph (c), but in such event the majority opinion shall be published as well.

(e) Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish."

(f) Rehearing. If a rehearing is granted, no opinion shall be published until after the decision on rehearing is issued.

(g) Action of Court En Banc. The court en banc may modify or overrule a panel's decision with regard to the signing or publication of the panel's opinion or opinions in a particular case. A majority of justices shall determine whether written opinions handed down by the court en banc shall be signed by a justice or issued per curiam, and whether they shall be published.

(h) Order of the Supreme Court, Upon the grant or refusal of an application for writ of error, whether by outright refusal or by refusal no reversible error, an opinion previously unpublished shall forthwith be released for publication, if the Supreme Court so orders.

(i) Unpublished Opinions. Unpublished opinions shall not be cited as authority by counsel or by a court.

* * *

Rule 133. Orders on Applications for Writ of Error

(a) Notation on Denial of Application. In all cases where the judgment of the court of appeals is correct and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error of law which requires reversal or which is of such importance to the jurisprudence of the State as to require correction, the court will deny the application with the notation "Writ Denied." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction."

(b) Conflict in Decisions. In cases of conflict named in subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate. If the decision of the court of appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.

(c) Moot Cases. If a cause or an appealable portion thereof is moot, the Supreme Court may, in its discretion and after notice to the parties, upon granting writ of error and without hearing argument with reference thereto, dismiss such

cause or the appealable portion thereof without reference to the merits of the appeal.

* * *

§ 5.106. Time and Effect of Establishment of Credit

(a) Unless otherwise agreed a credit is established

(1) as regards the customer as soon as a letter of credit is sent to him or the letter of credit or an authorized written advice of its issuance is sent to the beneficiary; and

(2) as regards the beneficiary when he receives a letter of credit or an authorized written advice of its issuance.

(b) Unless otherwise agreed once an irrevocable credit is established as regards the customer it can be modified or revoked only with the consent of the customer and once it is established as regards the beneficiary it can be modified or revoked only with his consent.

(c) Unless otherwise agreed after a revocable credit is established it may be modified or revoked by the issuer without notice to or consent from the customer or beneficiary.

(d) Notwithstanding any modification or revocation of a revocable credit any person authorized to honor or negotiate under the terms of the original credit is entitled to reimbursement for or honor of any draft or demand for payment duly honored or negotiated before receipt of notice of the modification or revocation and the issuer in turn is entitled to reimbursement from its customer.

APPLICATION FOR COMMERCIAL CREDIT

TO: **Banque de Paris et des Pays-Bas**

400 PARK AVENUE
NEW YORK, N. Y. 10022

IRREVOCABLE CREDIT NO. 711828FT

DATE July 9, 1981

REFERENCE: Hal Peist

[redacted] (DETAILS)

PLEASE ISSUE FOR OUR ACCOUNT AN **IRREVOCABLE CREDIT** AND ADVISE BY ☐ CABLE IN BRIEF, FULL DETAILS BY MAIL ☐ AIRMAIL

THE ACCOUNT OF HOUSTON OIL & REFINING, INC.

IN FAVOR OF Exxon Company, U.S.A.

ADDRESS 800 Bell, Room 3593 Houston, Texas 77001 [redacted]

FOR AN AMOUNT OF U.S. $19,530,000.00 ABOUT / MAXIMUM / MORE OR LESS %

AVAILABLE AT ___ AT SIGHT / ___ DAYS SIGHT / BY DRAFT DRAWN ON Not prior to 8/20/81 AT ___ DAYS FROM

AGAINST THE FOLLOWING DOCUMENTS

(1) ☒ COMMERCIAL INVOICE IN 3 COPIES ~~[illegible]~~ covering approximately 18,000 B/D South Louisiana Light Crude Oil delivered pipeline facilities St. James, La. during July, 1981

☐ EX. WORKS ☐ F.A.S. ☐ F.O.B. ☐ C&F ☐ C.I.F. ☐ OTHER

☐ INSURANCE POLICY/CERTIFICATE ISSUED BY AN INSURANCE COMPANY IN NEGOTIABLE FORM COVERING FOR PAYABLE IN

☐ MARINE AND WAR RISK INSURANCE COVERED BY US.

(2) ☒ SHIPPING DOCUMENTS Copies of pipeline tickets or transfer statement evidencing delivery and/or transfer of crude oil from Exxon Company, U.S.A. to Houston Oil & Refining, Inc.

(3) ☒ Statement signed by an authorized representative certifying that Houston Oil & Refining, I has failed to deliver to Exxon Company, U.S.A.558,000 barrels of one of the following: ☐ ~~OTHER DOCUMENTS~~ South Louisisana to St. James, La., West Texas Sour to Shell, McCamey or Exxon, Crane, Arab Light to U.S. Gulf Coast or Alaskan North Slope to U.S. Gulf Coast.between September and December, 1981.

(4) ☒ EXPIRATION DATE October 31, 1981.

SHIPMENT FROM ___ TO ___

SHIPMENT LATEST ___

PARTIAL SHIPMENTS ☐ PERMITTED ☐ NOT PERMITTED

TRANSHIPMENT ☐ PERMITTED ☐ NOT PERMITTED

THIS LETTER OF CREDIT IS NOT TO BE AVAILABLE AFTER EXPIRATION. PLEASE ADVISE CONFIRM IT THROUGH ___

SPECIAL INSTRUCTIONS Receivable: Ashland 526S, Sohio 220S

THE OPENING OF THIS CREDIT IS SUBJECT TO THE TERMS AND CONDITIONS AS SET FORTH IN THE COMMERCIAL LETTER OF CREDIT AGREEMENT APPEARING ON THE REVERSE HEREOF TO WHICH WE AGREE OR IF OUR CONTINUING AGREEMENT IS LODGED WITH YOU. SUBJECT TO THE TERMS AND PROVISIONS SET FORTH THEREIN

AUTHORIZED SIGNATURES

HOUSTON OIL & REFINING, INC.

TELEPHONE NO. ___

DEFENDANT'S EXHIBIT 2

BEST AVAILABLE COPY

APPENDIX 3 7A

400 PARK AVENUE
NEW YORK, N.Y. 10022

1. In consideration of your issuing, at the request of the undersigned (or, if more than one, of any one or more of the undersigned), your Commercial Letter of Credit (hereinafter called the "Credit"), we jointly and severally hereby unconditionally agree as follows:

2. As to drafts, acceptances or other instruments or demands under or purporting to be under the Credit which are payable in United States Currency, we agree: (a) in the case of each sight draft, instrument or demand, to reimburse you, at your office, on demand, the amount paid on such draft, instrument or demand, or, if so demanded by you, to pay to you at your office in advance the amount required to pay such draft, instrument or demand, and (b) in the case of each acceptance, to pay to you, at your office, the amount thereof, on demand but in any event not later than one business day prior to maturity, or, in case the acceptance is not payable at your office then on demand but in any event in time to reach the place of payment in the course of the mails not later than one business day prior to maturity.

3. As to drafts, acceptances or other instruments or demands under or purporting to be under the Credit, which are payable in currency other than United States Currency, we agree: (a) in the case of each sight draft, instrument or demand, to reimburse you, at your office, on demand, the equivalent of the amount paid, at the rate of exchange then current in New York for cable transfers to the place of payment in the currency in which such draft or instrument is drawn or the demand is made, or if there be no such rate at said time, then at such rate as you may fix; and (b) in the case of each acceptance, to furnish you, at your office, on demand, but in any event in time to reach the place of payment in the course of the mails not later than one business day prior to maturity, with first class bankers' demand bills of exchange to be approved by you for the amount of the acceptance, payable in the currency of the acceptance, and bearing our endorsement, or, if you so request, to pay to you, at your office, on demand, the equivalent of the acceptance at the rate of exchange current in New York for cable transfers at time of transmission to the place of payment in the currency in which the acceptance is payable, or if there be no such rate at said time, then at such rate as you may fix.

4. In the event that any United States Currency drafts are drawn by us or any of us on you in order to refinance any obligation set forth in the preceding two sections, and such drafts, at your option, are accepted by you, we agree to pay you on demand, but in any event not later than the maturity date, the amount of each such acceptance, and this agreement shall be applicable to all drafts so accepted by you as if such drafts were drawn under the Credit. Each amount which may become due and payable to you under this agreement may, in your discretion and if not otherwise paid, be charged by you to any available funds then held by you for our account.

5. We also agree to pay you, on demand, a commission and all charges and expenses paid or incurred by you in connection with the Credit and this agreement, and interest where chargeable. Said commission and interest shall be at such rates as may be established by you.

6. As security for any and all of our obligations and liabilities hereunder and also for any and all other of our obligations and liabilities (or the obligations or liabilities of any of us) to you, however created, arising or evidenced, whether joint or several, direct or indirect, absolute or contingent, or now or hereafter existing, or due or to become due (hereinafter called the "Liabilities"), we hereby grant to you a security interest in, and recognize and admit your ownership in and unqualified right to, the possession and disposal of all property shipped under or pursuant to or in connection with the Credit or in any way relative thereto, and to any of the drafts, instruments or demands drawn or made thereunder, and also in and to any and all shipping documents, warehouse receipts, policies or certificates of insurance and other documents accompanying or relative to drafts drawn or made under the Credit, (whether or not such goods, documents, or other property be released to us, or upon our order, on trust or bailee receipt or otherwise under any instrument whereby you retain a security interest), and in and to the proceeds of each and all of the foregoing, until such time as all the Liabilities have been fully paid and discharged. All such goods, instruments, documents and other property hereinabove referred to, together with any and all other property in which you are granted a security interest by us (or any of us) hereunder or under any other instrument, are hereinafter collectively referred to as the "Collateral". All or any of the Collateral coming into your possession or that of any of your correspondents may be dealt with, held, and disposed of by you as hereinafter provided; and receipt by you, or any of your correspondents at any time, of other security, including cash, shall not be deemed a waiver of any of your rights and powers herein mentioned. In the event that you deliver to us any of such property or the documents of title thereto prior to your having received reimbursement with respect to the relative drafts or acceptances as herein provided, we agree to execute and deliver to you trust receipts or other security instruments and statements of financing complying with the requirements of the applicable law, in such form as may be required by you, and to pay all filing fees in connection therewith, it being understood that your rights as specified herein or therein shall be in addition to, and not in limitation of, your rights under any applicable law.

7. In the event you receive some but not all of the documents against which drawings, by whatsoever method, may be made and, at our request, you deliver such documents to us, against trust receipt or otherwise, prior to the presentation of the relative draft, we agree to pay you on demand the amount of any claim made against you by reason thereof and authorize you to pay or accept (as the case may be) such draft when it is presented regardless of whether or not such draft or any document which may accompany it complies with the terms of the Credit.

8. Except insofar as instructions have been heretofore given by us in writing expressly to the contrary, we agree that you and any of your correspondents may receive and accept as "bills of lading" under the Credit, any documents issued or purporting to be issued by or on behalf of any carrier which acknowledge receipt of property for transportation, whatever the specific provisions of such documents, and that the on board date of each such document shall be deemed the date of shipment of the property mentioned therein, and that you may receive and accept as documents of insurance either insurance policies or insurance certificates. You may receive and accept as sufficient and controlling the description of the property contained in the invoice, and may receive and accept bills of lading, insurance and other documents, however variant in description from that contained in the invoice. You and any of your correspondents may receive and accept bills of lading containing stamped, written or typewritten provisions thereon, whether or not signed or initialed, and you and any of your correspondents may assume conclusively that the same were placed with authority on the bill of lading at the time of its signing and issuance by the steamship company or carrier or any agent thereof. You and any of your correspondents may accept documents of any character which comply with the provisions, definitions, interpretations and practices contained in the "Uniform Customs and Practice for Commercial Documentary Credits fixed by the International Chamber of Commerce", and any amendments thereto, or which comply with the laws or regulations in force in, or the customs or usages of, the place of shipment or negotiation.

9. Except insofar as instructions have been heretofore given by us in writing expressly to the contrary, we agree that part shipments may be made under the Credit and you may honor the relative drafts, instruments or demands. We agree that you and any of your correspondents may accept or pay any draft dated on or before the expiration of any time limit expressed in the Credit, regardless of when drawn and whether or when negotiated, provided the other required documents are dated on or prior to the expiration date of the Credit.

10. In the event of any increase in the amount of the Credit, or the extension (for one or more periods, whether or not longer than the original period) of the maturity or time for presentation of drafts, instruments, demands, acceptances or documents, or any other modification of the terms of the Credit at the request of any of us, with or without notice to the others of us, this agreement, and your rights hereunder, shall continue unimpaired and shall be binding upon us with respect to the Credit as increased, so extended or otherwise modified and with respect to any action taken by you or any of your correspondents in accordance with such extension, increase or other modification.

11. The users of the Credit shall be deemed our agents and we assume all risks of their acts and omissions. Neither you nor your correspondents shall be responsible for: the existence, character, quality, quantity, condition, packing, value, or delivery of the property purporting to be represented by documents; any difference in character, quality, quantity, condition, or value of the property from that expressed in documents; the validity, sufficiency, or genuineness of documents, even if such documents should in fact prove to be in any or all respects invalid, insufficient, fraudulent or forged; the time, place, manner or order in which shipment is made, partial or incomplete shipment, or failure or omission to ship any or all of the property referred to in the

[illegible] liability of any issuer, or for any other risk connected with insurance; any deviation from instructions, delay, default or fraud by the shipper or anyone else in connection with the property or the shipping thereof; the solvency, responsibility or relationship to the property of any party issuing any documents in connection with the property; delay in arrival or failure to arrive either the property or any of the documents relating thereto; delay in giving or failure to give notice of arrival or any other notice; any breach of contract between the shippers or vendors and ourselves or any of us; compliance with or circumstances resulting from any laws, customs or regulations which may be effective in countries of negotiation or payment of the Credit; failure of any draft, instrument or demand to bear any reference or adequate reference to the Credit, or failure of documents to accompany any draft, instrument or demand at negotiation, or failure of any person to note the amount of any draft, instrument or demand on the reverse of the Credit or to surrender or take up the Credit or to send forward documents apart from drafts, instruments or demands, as required by the terms of the Credit, each of which provisions, if contained in the Credit itself, it is agreed may be waived by you; errors, omissions, interruptions or delays in transmission or delivery of any messages, by mail, cable, telegraph, wireless or otherwise, whether or not they be in cipher; nor shall you be responsible for any act, error, neglect, or default, omission, insolvency or failure in the business of any of your correspondents or for any refusal by you or any of your correspondents to pay or honor drafts drawn under the Credit because of any applicable law, decree or edict, legal or illegal, of any governmental agency now or hereafter in force, or for any other matter beyond your control; and none of the above shall affect, impair or prevent the vesting of any of your rights or powers hereunder, or our obligations hereunder. Furtherance and extension and not in limitation of the specific provisions hereinbefore set forth, we agree that any action taken by you or by any of your correspondents under or in connection with the Credit or the relative drafts, instruments or demands, documents or property, if taken in good faith, shall be binding on us and shall not put you or your correspondents under any resulting liability to us; and we make like agreement as to any inaction or omission, unless in breach of good faith. We further agree that we will indemnify you and hold you harmless from and against each and every claim, demand, action or suit which may arise against you, or any of your correspondents, by reason of any action taken pursuant to this agreement.

12. We agree to procure promptly any necessary import and export and other licenses for the import or export or shipping of the property or payment therefor, and to comply with all foreign and domestic governmental regulations in regard to the shipment of the property or the finance thereof, and to furnish such certificates in that respect as you may at any time require, and to keep the property adequately covered by insurance satisfactory to you, in companies satisfactory to you, and to assign the policies or certificates of insurance to you, or to make the loss, if any, payable to you, at your option; and to furnish you if demanded with evidence of acceptance by the insurers of such assignment.

13. Each of us agrees at any time and from time to time, if you shall feel insecure, to deliver, convey, transfer, and assign to you, on demand, as security for any and all Liabilities, additional Collateral of a value and character satisfactory to you. Each of us agrees that all property belonging to us or any of us, or in which we or any of us may have an interest, of every kind and nature whatsoever, now or at any time hereafter delivered, conveyed, transferred, assigned or paid to you, or coming into your possession or into the possession of anyone for you in any manner whatsoever, whether expressly as security for any of the Liabilities, or for safe keeping or otherwise, and all items received for collection or transmission and the proceeds thereof, whether or not such property is in whole or in part released to us on trust or bailee receipt or otherwise under any instrument whereby you retain a security interest, are hereby pledged as security for Liabilities. Each of us agrees, with respect to himself, ourselves and any endorsers or guarantors of our obligations under this agreement, that upon the failure of any of us to perform any agreement herein contained or contained in any security instrument or other agreement delivered to you, or upon the default in the punctual payment of any sum due under the Credit, or upon failure at any time to keep a margin of security with you satisfactory to you, or upon the death of any of us, or upon the making by us or any of us of any assignment for the benefit of creditors, or upon the the filing of any voluntary or involuntary petition in bankruptcy or for arrangement or reorganization by or against us or any of us, or upon the application for the appointment of a receiver of any of the property of all or any of us, or upon any act of bankruptcy or state of insolvency of all or any of us, or if any governmental authority or any court at the instance of any governmental authority shall take possession of any substantial part of the property of all or any of us or shall assume control over the affairs or operations of all or any of us or if a receiver shall be appointed of, or if a writ or order of attachment or garnishment shall be issued or made against, the property or assets of all or any of us, or if, with respect to all or any of us, an application is made under Articles 51 and 52 of the New York Civil Practice Law and Rules by any judgment creditor for any order directing you to pay over money, or if suit, proceeding, or other action (at law or in equity) for the dissolution, reorganization, or liquidation is commenced, then all Liabilities shall become and be immediately due and payable without demand or notice, notwithstanding any credit or time allowed to us or any of us, or any instrument evidencing any such Liabilities, and each of us, as to property in which he may have any interest, and all of us, as to property in which we may have any interest, expressly authorize you, to the extent permitted by applicable law, in any such event, to sell immediately without demand for payment, without advertisement and without notice to us or any of us, all which are hereby expressly waived, any and all Collateral, arrived or to arrive, at private sale at public auction or at brokers' board or otherwise, at your option, in such parcel or parcels and at such time or times and at such place or places and for such price or prices and upon such terms and conditions as you may deem proper; and you are also given the right, power and authority, in your discretion, to collect or cause to be collected or otherwise to convert into money, all or any part of the Collateral, and you may, in your discretion, enforce the collection of the Collateral, with all additions thereto and substitutes therefor, by suit or otherwise, may surrender, compromise, release, renew, extend (for one or more periods, whether or not longer than the original period) or exchange any or all of the Collateral, and you may apply the net proceeds of such sale or sales, collection, exchange or conversion together with any balance of deposits and any sums credited by or due from you to us or any of us in general account or otherwise, to the payment of the costs, expenses and attorneys' fees incurred in respect of the Collateral, and the sale, collection, exchange or conversion thereof, and to the payment of any and all Liabilities. If any such sale be at brokers' board or at public auction you may purchase yourself, to the extent permitted by applicable law, be a purchaser at such sale, free from any right of redemption, which we and each of us hereby expressly waive and release. You are, however, released from all obligation or liability to collect any of the Collateral or to bind or charge any maker or endorser thereof.

14. The undersigned hereby certify and agree that no shipments will be made or other transactions undertaken under the Credit in violation of the laws of the United States or the regulations of any governmental agency.

15. You shall not be deemed to have waived any of your rights hereunder, unless you or your authorized agent shall have signed such waiver in writing. No such waiver, unless expressly stated therein, shall be effective as to any transaction which occurs subsequent to the date of such waiver, nor as to any continuance of a breach after such waiver.

16. The word "property" as used in this agreement includes goods, merchandise, securities, funds, choses in action, and any and all other forms of property, whether real, personal or mixed, and any right or interest therein.

17. If this agreement is signed by one individual, the terms "we," "our," "us," shall read throughout as "I," "the undersigned," "my," "me," as the case may be. If this agreement is signed by two or more parties, it shall be the joint and several agreement of such parties. Each of us shall be deemed to be the agent of all the others of us, and you, except to the extent expressly otherwise provided herein, act at the direction or request of any one or more of us, return or turn over the Collateral and any other property to any one or more of us, and give any notice or notices, whether or not required to be given, to any one or more of us, all as you may elect and without notice to any others of us.

This agreement is binding upon our heirs, legal representatives, successors and assigns.

This agreement has been made and delivered at New York, N. Y., and shall be governed by the Laws of the State of New York. The Credit shall be subject to the "Uniform Customs and Practice for Commercial Documentary Credits fixed by the International Chamber of Commerce except to the extent otherwise specifically set forth herein or therein. Wherever possible each provision of this agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this agreement shall be prohibited by or invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without

BEST AVAILABLE COPY

APPENDIX 4

[SEAL OF THE STATE OF TEXAS]

Court of Appeals
Seventh District of Texas
Potter County Courts Building
501 Fillmore, Suite 2-A
Amarillo, Texas 79101

January 27, 1988

Mr. Kelly Bickerstaff
McCLESKEY HARRIGER BRAZILL & GRAF
P.O. Drawer 6170
Lubbock, Texas 79493

Re: Kerr Construction Company and the City of Lubbock v. The Plains National Bank of Lubbock, No. 07-86-0205-CV

Dear Mr. Bickerstaff:

In the above captioned cause, the Court this day overruled Appellee's Motion to Publish Opinion, of which you will please take due notice.

Very truly yours,

PEGGY CULP, CLERK

/s/ JoAnn Glover
JoAnn Glover, Deputy

bw

xc: Mr. Donald M. Hunt
CARR EVANS FOUTS & HUNT
P.O. Box 2585
Lubbock, Texas 79408

Mr. J. Worth Fullingim
City Attorney's Office
P.O. Box 2000
Lubbock, Texas 79457

APPENDIX 5

No. C-7185

IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

THE PLAINS NATIONAL BANK OF LUBBOCK,

Petitioner

—v.—

KERR CONSTRUCTION COMPANY and THE CITY OF LUBBOCK,

Respondents.

MOTION TO PUBLISH

TO THE SUPREME COURT OF TEXAS:

Exxon Company, U.S.A. ("Exxon"), amicus curiae, files this motion requesting that, pursuant to Texas Rule of Appellate Procedure 90(h), this Court order publication of the decision of the Amarillo Court of Appeals.

Petitioner and the American Bankers Association, amicus curiae, rely heavily on the recent decision in *Exxon* v. *Banque de Paris et des Pays-Bas*, 828 F.2d 1121 (5th Cir. 1987), in which the Fifth Circuit Court of Appeals held that the expiry date in a letter of credit controls over all other inconsistent terms in a letter of credit even though that interpretation of the letter of credit rendered it impossible for Exxon, the beneficiary, to make the statement of default required in the letter of credit. The Fifth Circuit's opinion squarely conflicts with the rules of construction announced and consistently applied by

this Court and applied by the Amarillo Court of Appeals in this case.

After the time for filing a petition for rehearing had expired in Exxon's Fifth Circuit case, the Amarillo Court of Appeals handed down its unpublished opinion in this case. Sometime later Exxon became aware of the Court of Appeals' decision. Although a motion to publish was filed with the Amarillo Court of Appeals, that motion was denied. Based on the Amarillo Court of Appeals' opinion, Exxon moved in the Fifth Circuit to recall the mandate and for leave to file a second suggestion for reconsideration en banc. The Fifth Circuit denied Exxon's motions *solely* because the decision of the Amarillo Court of Appeals in this case is unpublished. Ex. A. The Fifth Circuit also refused to stay its decision in Exxon's case pending a final decision by this Court and further refused to certify the controlling question of Texas law in the diversity case to this Court.

The standards for publication, as expressed in Texas Rule of Appellate Procedure 90(c), are certainly met in this case. Indeed, the Court of Appeals' opinion should now be published because it meets three of the applicable four reasons for publication: (1) it applies an existing rule of law to a novel fact situation likely to recur in future cases; (2) it involves a legal issue of continuing public interest; and (3) it resolves a conflict of authority. *Id.* Any one of these reasons is a sufficient ground for publication.

Only by ordering publication of the Court of Appeals' opinion under Rule 90(h) can this Court ensure that the Fifth Circuit will correctly apply the law of Texas, a matter of vital interest to this Court and to the citizens of Texas. Furthermore, Exxon should not be denied the opportunity to have Texas law correctly applied in its diversity case merely because the Court of Appeals' opinion in this case is unpublished.

In light of the above, Exxon respectfully requests that this Court order that the Court of Appeals' opinion be published.

Respectfully submitted,

/s/ C. MARK BAKER

Rufus Wallingford
State Bar No. 20787000
C. Mark Baker
State Bar No. 01566010
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151

Attorneys for Amicus Curiae
Exxon Company, U.S.A.

[Certificate of service and exhibits have not been reprinted]

APPENDIX 6

IN THE

SUPREME COURT OF TEXAS

April 27, 1988

No. C-7185,	)	
	)	
THE PLAINS NATIONAL BANK OF LUBBOCK	)	
	)	
	)	From LUBBOCK County,
vs.	)	Seventh District
	)	
KERR CONSTRUCTION COMPANY ET AL.	)	

Application of petitioner for writ of error to the Court of Appeals for the Seventh District, together with amicus curiae's, Exxon Company, U.S.A., motion to publish and motion to supplement the motion to publish and brief previously filed by amicus curiae Exxon Company, U.S.A., having been duly considered, it is ordered that said motion to supplement the motion to publish be granted, and that the motion to publish, as supplemented, be, and hereby is, overruled, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, The Plains National Bank of Lubbock, pay all costs incurred on this application.

APPENDIX 7

SUPREME COURT OF TEXAS

P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

May 25, 1988

Mr. George H. McCleskey
Mr. Kelly Bickerstaff
McCleskey, Harriger, Brazill
& Graf
P.O. Drawer 6170
Lubbock, TX 79493

Mr. John C. Ross, Jr.
Lubbock City Attorney
P.O. Box 2000
Lubbock, TX 79457

Mr. James P. Brewster
Civil Trial Attorney
City of Lubbock
P.O. Box 2000
Lubbock, TX 79457

Mr. J. Worth Fullingim
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, TX 79457

Mr. Donald M. Hunt
Carr, Evans, Fouts & Hunt
P.O. Box 2585
Lubbock, TX 79408

Mr. Rufus Wallingford
Mr. C. Mark Baker
Fulbright & Jaworski
1301 McKinney Street
Houston, TX 77010

Mr. Luther M. Soules, III
Soules, Reed & Butts
800 Milam Building
San Antonio, TX 78205

Mr. John J. Grill
Mr. Michael F. Crotty
American Bankers Assn.
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

RE: Case No. C-7185

STYLE: THE PLAINS NATIONAL BANK OF LUBBOCK
v. KERR CONSTRUCTION COMPANY ET AL.

Dear Counsel:

Today, the Supreme Court of Texas dismissed for want of jurisdiction the motion for rehearing of motion to publish on behalf of amicus curiae, Exxon Company, U.S.A.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ PEGGY LITTLEFIELD
Peggy Littlefield, Chief Deputy

APPENDIX 8

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

June 1, 1988

Mr. George H. McCleskey
McCleskey, Harriger, Brazill & Graf
P.O. Drawer 6170
Lubbock, TX 79493

Mr. Kelly Bickerstaff
McCleskey, Harriger, Brazill & Graf
P.O. Drawer 6170
Lubbock, TX 79493

Mr. John C. Ross, Jr.
Lubbock City Attorney
P.O. Box 2000
Lubbock, TX 79457

Mr. James P. Brewster
Civil Trial Attorney
City of Lubbock
P.O. Box 2000
Lubbock, TX 79457

Mr. J. Worth Fullingim
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, TX 79457

Mr. Donald M. Hunt
Carr, Evans, Fouts & Hunt
P.O. Box 2585
Lubbock, TX 79408

Mr. Rufus Wallingford
Mr. C. Mark Baker
Fulbright & Jaworski
1301 McKinney Street
Houston, TX 77010

Mr. Luther M. Soules, III
Soules, Reed & Butts
800 Milam Building
San Antonio, TX 78205

Mr. John J. Grill
Mr. Michael F. Crotty
American Bankers Assn.
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

RE: Case No. C-7185

STYLE: THE PLAINS NATIONAL BANK OF LUBBOCK
v. KERR CONSTRUCTION COMPANY ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ illegible
Deputy

APPENDIX 9

[Cover page has not been reprinted]

No. 07-86-0205-CV

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT
AT AMARILLO, TEXAS

KERR CONSTRUCTION COMPANY AND THE CITY OF LUBBOCK,

APPELLANTS

—v.—

THE PLAINS NATIONAL BANK OF LUBBOCK,

APPELLEE

MOTION TO PUBLISH

TO THE COURT OF APPEALS:

Exxon Company, U.S.A. (Exxon), files this motion requesting that, pursuant to Texas Rule of Appellate Procedure 90(c), this Court order publication of the Amarillo Court of Appeals opinion previously rendered in this case.

Exxon appeared as an amicus curiae in support of this Court's opinion in the Supreme Court of Texas when The Plains National Bank applied for a writ of error in this case. At that time Exxon also asked that the Texas Supreme Court order the publication of this Court's opinion. However, the Texas Supreme Court has now denied the petitioners' application for writ of error and overruled its motion for rehearing. The Texas Supreme Court also dismissed Exxon's motion to publish for want of jurisdiction. Since the Texas Supreme Court has

decided it does not possess jurisdiction to order publication of this Court's opinion, Exxon now files its motion to publish in this Court as the Court properly possessing the jurisdiction to order publication of its previous rendered opinion.

Exxon believes that this Court should publish its opinion because the United States Supreme Court has granted Exxon's petition for a writ of *certiorari* to the Fifth Circuit in a case styled, *Exxon Co. U.S.A.* v. *Banque de Paris et des Pays-Bas* (Paribas), No. 87-1467 (*cert. granted* April 25, 1988), opinion below, 828 F.2d 1121 (5th Cir. 1987).

The facts and issues considered by this Court in *Kerr Construction* are virtually identical to those before the United States Supreme Court. In its petition for *certiorari*, Exxon contended that the Fifth Circuit wrongly refused to follow clear Texas precedent governing letters of credit. Exxon believes the opinion of the Amarillo Court of Appeals in *Kerr Construction* is the clearest, as well as the most recent expression of the Texas law governing letters of credit. The United States Supreme Court obviously agrees because that Court has granted *certiorari* on the following question:

> If after a federal court of appeals has entered judgment in a diversity case, but while the case remains *sub judice*, a state intermediate appellate court decides a controlling issue of state law in manner that conflicts with the judgment of the federal court, should the federal court vacate its judgment and reconsider in order to ensure adherence to applicable state law?

56 U.S.L.W. 3730.

Exxon's petition for *certiorari* was opposed by Paribas solely on the ground that the opinion of the Amarillo Court of Appeals in this case is unpublished. Unless this Court orders its opinion published, Paribas may escape application of the substantive law of Texas governing letters of credit simply because it removed Exxon's lawsuit to federal court. Until Exxon's petition for *certiorari* was granted on April 25, 1988, Paribas had successfully avoided the law of Texas because the Fifth Circuit refused to apply clear Texas precedent and instead applied its own notion of general commercial law.

Unless Exxon's motion to publish is granted, it will make it more difficult for the United States Supreme Court to correct the Fifth Circuit's refusal to apply controlling Texas precedent. Exxon submits that publication of the Amarillo Court of Appeals' decision under Rule 90 is the only way for this Court to insure that the substantive law of Texas governing letters of credit is applied in both the state and federal courts. After publication, the United States Supreme Court, under established *Erie* principles, will be able to instruct the Fifth Circuit to withdraw its opinion and act in conformity with the Amarillo Court of Appeals' opinion in *Kerr Construction*.

The standards for publication, as expressed in Texas Rule of Appellate Procedure 90(c), are certainly met in this case. Indeed, the Court of Appeals' opinion should now be published because: (1) it applies an existing rule of law to a novel fact situation; (2) it involves a legal issue of continuing public interest; (3) and it resolves a conflict of authority with a federal court applying Texas law while sitting in diversity. As the Court is aware, any one of these reasons is a sufficient ground for publication.

The correct application of Texas law in diversity cases is a matter of vital interest to this Court and to the citizens of Texas. It is imperative that the Texas law governing letters of credit be clearly announced and followed both in the state courts of Texas and in the Fifth Circuit. Exxon should not be denied the opportunity to have Texas law correctly applied in its diversity case merely because the Court of Appeals' opinion in this case remains unpublished.

In light of the recent action of the United States Supreme Court, Exxon respectfully requests that this Court order publication of its previously rendered opinion.

Respectfully submitted,

/s/ C. MARK BAKER

Rufus Wallingford
State Bar No. 20787000
C. Mark Baker
State Bar No. 01566010
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151

/s/ LUTHER H. SOULES, III

Luther H. Soules, III
State Bar No. 18858000
Soules, Reed & Butts
800 Milam Building
San Antonio, Texas 78205
(512) 224-9144

Attorneys for Exxon Company, U.S.A.

[Certificate of service has not been reprinted]